

E-FILED on 8/23/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LUIS DUENES MARTINEZ,

Petitioner,

v.

MIKE EVANS, Warden,

Respondent.

No. C-06-00496 RMW

ORDER GRANTING MOTION FOR
APPOINTMENT OF COUNSEL**[Re Docket No. 9]**

Petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 11, 2006, the court ordered respondent to show cause why the petition should not be granted. Petitioner submits an *ex parte* request for an order for *nunc pro tunc* appointment of William M. Robinson from the Sixth District Appellate Program as counsel pursuant to 18 U.S.C. § 3006A(a)(2)(B). Robinson prepared petitioner's habeas petition on a pro bono basis, appeared in this case on February 16, 2007 and has now filed a traverse on petitioner's behalf. Respondents have not opposed petitioner's request.

The Sixth Amendment right to counsel does not apply in habeas corpus actions. *See Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes a district court to appoint counsel to represent a habeas petitioner when "the court determines that the interests of justice so require" *See also* 28

1 U.S.C. § 1915(a) and Rule 8(c), foll. 28 U.S.C. § 2254. Appointment of counsel is required
 2 where an evidentiary hearing must be held, but where one is not mandated the decision to appoint
 3 counsel is discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481
 4 U.S. 1023 (1987). The court must appoint counsel where the complexities of the case are such that
 5 denial of counsel would amount to a denial of due process. *Brown v. United States*, 623 F.2d 54, 61
 6 (9th Cir. 1980).


7 The court finds this action sufficiently complex and meritorious to warrant the requested
 8 appointment of counsel. Petitioner alleges that the denial of presentence and post-conviction time
 9 credits pursuant to Cal. Penal Code § 2933.1 for crimes committed before the effective date of §
 10 2933.1 violated the Ex Post Facto Clause (U.S. Const. Art. I, § 10, cl. 1) and that the state court's
 11 determination was contrary to, or an unreasonable application of, federal law. This presents
 12 a complex constitutional issue on which the petitioner has some likelihood of success and
 13 with which he may legitimately require counsel's assistance to articulate. *See Weygandt v.*
 14 *Look*, 718 F.2d 952, 954 (9th Cir. 1983). Accordingly, the court hereby appoints William M.
 15 Robinson as counsel for petitioner. Mr. Robinson, a staff attorney with the Sixth District
 16 Appellate Program, represented petitioner in state court, prepared petitioner's federal habeas
 17 petition *pro bono* and is familiar with petitioner's case.

18 Counsel may seek payment for his representation of petitioner as provided in 18
 19 U.S.C. § 3006A(d) and (e) and General Order No. 2 of the Criminal Justice Act Plan for the
 20 United States District Court for the Northern District of California, IV-D ("Discretionary
 21 Appointments").

22 III. ORDER

23 For the foregoing reasons, petitioner's *ex parte* motion for *nunc pro tunc* appointment
 24 of counsel is granted.

25
 26
 27 DATED: 8/22/07


 RONALD M. WHYTE
 United States District Judge

1 **Notice of this document has been electronically sent to:**

2 **Counsel for Petitioner:**

3 William M. Robinson bill@sdap.org

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7
8 Counsel are responsible for distributing copies of this document to co-counsel that have not
9 registered for e-filing under the court's CM/ECF program.

10
11 **Dated:** 8/23/07

/s/ MAG
Chambers of Judge Whyte

United States District Court
For the Northern District of California